

² The Board notes that, following the April 23, 2020 decision, OWCP received additional evidence. However, the Board’s *Rules of Procedure* provides: “The Board’s review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal.” 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period December 1, 2014 through February 1, 2020, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$539.92 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On July 5, 2011 appellant, then a 62-year-old mail handler, filed an occupational disease claim (Form CA-2) alleging that the repetitive factors of his employment, including loading/unloading trucks, separating the mail, and lifting, bending, and placing flats on the flatbed truck, caused and/or aggravated his hip, back and shoulder conditions. His retirement coverage was listed as Federal Employees Retirement System (FERS).³

OWCP accepted the claim for left shoulder rotator cuff tear, degenerative disc disease at C5-6, and left hip osteoarthritis. It paid appellant wage-loss compensation on the periodic rolls as of February 12, 2012.

In an August 23, 2019 letter, the employing establishment indicated that appellant had FERS coverage and was entitled to receive SSA age-related retirement benefits. It requested that OWCP determine if his SSA benefits qualified for the FERS offset and subsequent reduction of FECA benefits.

On October 25, 2019 OWCP provided SSA with a FERS/SSA dual benefits calculation form and requested that the computation period be provided.

In response, on January 21, 2020 OWCP received a completed FERS/SSA dual benefits calculation form from SSA dated January 15, 2020, which indicated appellant's SSA benefit rates with a FERS offset and without a FERS offset from December 2014 through December 2019. Beginning December 2014, the SSA rate with FERS was \$2,155.00 and without FERS was \$871.30. Beginning December 2015, the SSA rate with FERS was \$2,155.00 and without FERS was \$871.30. Beginning December 2016, the SSA rate with FERS was \$2,161.40 and without FERS was \$873.90. Beginning December 2017, the SSA rate with FERS was \$2,204.60 and without FERS was \$891.30. Beginning December 2018, the SSA rate with FERS was \$2,266.30 and without FERS was \$916.20. Beginning December 2019, the SSA rate with FERS was \$2,302.50 and without FERS was \$930.80. SSA also noted on the form that appellant began receiving retirement benefits as of December 2014.

On February 19, 2020 OWCP prepared a FERS offset calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from December 1, 2014 through February 1, 2020. The total overpayment was determined to be \$81,325.72. OWCP found that appellant received an overpayment of compensation in the amount of \$15,446.72 for the period December 1, 2014 through November 30, 2015; \$15,489.04 for the period December 1, 2015

³ A notification of personnel action (PS Form 50) dated August 31, 2012 listed appellant's service computation date as June 23, 1982 and appellant's retirement plan as FERS.

through November 30, 2016; \$15,492.45 for the period December 1, 2016 through November 30, 2017; \$15,802.90 for the period December 1, 2017 through November 30, 2018; \$16,245.71 for the period December 1, 2018 through November 30, 2019; and \$2,848.92 for the period December 1, 2019 through February 1, 2020.

In a February 19, 2020 letter, OWCP advised appellant that he had been receiving Social Security benefits on account of age since December 1, 2014 and that the SSA confirmed that a portion of his benefits were attributed to federal service and required an offset of his FECA compensation benefits. It indicated that starting February 2, 2020, \$1,266.18 would be offset from his FECA payments and that his new net compensation payment would be \$2,159.68.

On February 26, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$81,325.72 had been created. It explained that the overpayment occurred because appellant's SSA age-related retirement benefits that he received from December 1, 2014 through February 1, 2020 partially based on credits earned while working for the Federal Government, and that this portion of his SSA benefit constituted a prohibited dual benefit. OWCP found him not at fault in the creation of the overpayment and forwarded an overpayment action request form and an overpayment recovery questionnaire (Form OWCP-20). It requested that appellant provide supporting financial documentation, including income tax returns, bank account statements, bills, cancelled checks, pay slips, and any other records to support his reported income and expenses. OWCP afforded him 30 days to respond.

On March 4, 2020 appellant completed an overpayment action request form and requested that OWCP make a decision based on the written evidence. He indicated that he was requesting waiver of recovery of the overpayment because he did not know that he was being overpaid. Appellant also noted that the offset was creating a financial hardship.

In a Form OWCP-20 completed on March 4, 2020 appellant reported that his total income was \$6,550.68. He reported total monthly expenses of \$5,911.74. Appellant noted that he had \$100.00 in his checking account. Evidence received included page 1 of 2019 tax return, checking account statements for the period August 20, 2019 through February 20, 2020, and supporting billing statements with notations.

By decision dated April 23, 2020, OWCP finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$81,325.72 for the period December 1, 2014 through February 1, 2020, because he concurrently received SSA age-related retirement benefits and FECA wage-loss compensation benefits without an appropriate offset. It also found that he was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment finding that his monthly household income of \$6,550.58 exceeded his monthly household ordinary and necessary expenses of \$5,535.05,⁴ by \$1,015.63. OWCP required recovery of the overpayment by deducting \$539.92 from appellant's continuing compensation payments every 28 days.

⁴ OWCP noted that the minimum payment required by the creditor, as noted on the monthly billing statements, was used to determine appellant's monthly expenses.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁵ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁶

Section 10.421(d) of OWCP's implementing regulations requires that OWCP reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁷ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁸

ANALYSIS -- ISSUE 1

The Board finds that appellant received an overpayment of compensation in the amount of \$81,325.72, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period December 1, 2014 through February 1, 2020 without an appropriate offset.⁹

The evidence of record indicates that, while appellant was receiving compensation for wage-loss compensation benefits under FECA, he was also receiving SSA age-related retirement benefits based upon his federal service. A claimant cannot receive both compensation for wage-loss compensation benefits under FECA and SSA age-related retirement benefits attributable to federal service for the same period.¹⁰ The information provided by SSA established that appellant received SSA age-related retirement benefits that were attributable to federal service during the period December 1, 2014 through February 1, 2020. Consequently, the fact of overpayment has been established.

To determine the amount of the overpayment, the portion of SSA's benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided its rate with FERS and without FERS for specific periods

⁵ 5 U.S.C. § 8102(a).

⁶ *Id.* at § 8116.

⁷ 20 C.F.R. § 10.421(d); *see P.B.*, Docket No. 20-0862 (issued November 25, 2020); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018); *L.J.*, 59 ECAB 264 (2007).

⁸ FECA Bulletin No. 97-09 (February 3, 1997); *see P.B.*, *id.*; *see also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁹ *R.C.*, Docket No. 19-0845 (issued February 3, 2020); *A.F.*, Docket No. 19-0054 (issued June 12, 2019).

¹⁰ *Id.*

December 1, 2014 through February 1, 2020. OWCP provided its calculations for each relevant period based on SSA's worksheet and determined that appellant received an overpayment in the amount of \$81,325.72. The Board has reviewed OWCP's calculation of benefits received by the employee for the period December 1, 2014 through February 1, 2020 and finds that an overpayment of compensation in the amount of \$81,325.72 was created.¹¹

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA provides that an individual who is without fault in creating or accepting an overpayment is still subject to recovery of the overpayment unless adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience.¹² Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must then exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹³

Section 10.436 of OWCP's implementing regulations provides that recovery of an overpayment would defeat the purpose of FECA if such recovery would cause hardship because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income (including compensation benefits) to meet current ordinary and necessary living expenses and, also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹⁴ An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.¹⁵

Section 10.437 of OWCP's implementing regulations provides that recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship attempting to repay the debt; and when an individual, in reliance on such payments or on notice that such payments would be made, gives up a valuable right or changes his or her position for the worse.¹⁶ OWCP's procedures provide that, to establish that a valuable right has been relinquished, an individual must demonstrate that the right was in fact valuable, that he or she was unable to get the right back, and

¹¹ See *P.H., widow of K.H.*, Docket No. 19-1130 (issued November 19, 2020).

¹² 5 U.S.C. § 8129(a)-(b).

¹³ *Id.*; *L.S.*, 59 ECAB 350 (2008).

¹⁴ 20 C.F.R. § 10.436. OWCP's procedures provide that the assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a (3) (September 2018).

¹⁵ *Id.* at Chapter 6.400.4(a)(3) (September 2018).

¹⁶ 20 C.F.R. § 10.437; see *E.H.*, Docket No. 18-1009 (issued January 29, 2019).

that his or her action was based primarily or solely on reliance on the payment(s) or on the notice of payment.¹⁷

OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁸

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁹

Appellant has not established that recovery of the overpayment would defeat the purpose of FECA because he has not shown both that he needs substantially all of his current income to meet ordinary and necessary living expenses. On appeal he contends that his expenses are greater than that calculated by OWCP as he did not include his wife's expenses to creditors and lawn care. From the information available at the time of the April 23, 2020 decision, OWCP properly calculated appellant's monthly household income and monthly household expenses. Appellant's monthly income of \$6,550.68 exceeds his monthly ordinary and necessary expenses of \$5,535.05 by more than \$50.00. Thus, he has not shown that he needs substantially all of his current income to meet current ordinary and necessary living expenses.²⁰ Because appellant has not met the first prong of the two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it is unnecessary for OWCP to consider the second prong of the test.

Appellant also has not established that recovery of the overpayment would be against equity and good conscience because he has not shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt or that he relinquished a valuable right or changed his position for the worse in reliance on the payment which created the overpayment.²¹

Because appellant has not established that recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, he has failed to establish that OWCP acted improperly by denying waiver of recovery of the \$81,325.72 overpayment.

¹⁷ *Id.* at § 10.437(b)(1); *supra* note 15 at Chapter 6.400.4b(3)(a), (b).

¹⁸ *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

¹⁹ *See supra* note 14; *R.L.*, Docket No. 20-0186 (issued September 14, 2020).

²⁰ *See supra* note 12 at § 10.437(a)-(b).

²¹ *Supra* note 16 at § 10.437.

LEGAL PRECEDENT -- ISSUE 3

Section 10.441 of OWCP's regulations provides that, when an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as the error is discovered or his or her attention is called to the same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.²²

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$539.92 from appellant's continuing compensation payments every 28 days.

In determining whether appellant could repay the overpayment through \$539.92 deductions from continuing compensation payments, OWCP took into account his financial information as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, not necessarily eliminate it, while at the same time liquidating the debt in a reasonably prompt fashion. The Board finds that OWCP gave due regard to the financial information provided and found that his monthly income exceeded monthly expenses by approximately \$1,015.63.²³ Therefore, the Board finds that OWCP properly required recovery of the overpayment by deducting \$539.92 from appellant's compensation payments every 28 days.

CONCLUSION

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of \$81,325.72, for which he was not at fault, as he concurrently received SSA age-related retirement benefits while receiving FECA wage-loss compensation benefits for the period December 1, 2014 through February 1, 2020, without an appropriate offset. The Board also finds that OWCP properly denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$539.92 every 28 days from appellant's continuing compensation payments.

²² *Id.* at § 10.441(a); *see C.M.*, Docket No. 19-1451 (issued March 4, 2020).

²³ *L.M.*, Docket No. 19-1197 (issued January 8, 2020); *T.G.*, Docket No. 17-1989 (issued June 6, 2018).

ORDER

IT IS HEREBY ORDERED THAT the April 23, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 2, 2021
Washington, DC

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board